

## Wage and Hour Division, Labor

## § 788.10

### § 788.5 Reliance on official interpretations.

Under section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259), official interpretation issued under the Fair Labor Standards Act of 1938 may, under certain circumstances, be controlling in determining the rights and liabilities of employers and employees. The interpretations of the law contained in this part are official interpretations on which reliance may be placed as provided in section 10 of the Portal-to-Portal Act so long as they remain effective and are not modified, rescinded, or determined by judicial authority to be incorrect. However, the failure to discuss a particular problem in this part or in the interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy.

### § 788.6 Scope of the section 13(a)(13) exemption.

Employees will not be held exempt under section 13(a)(13) unless they are clearly shown to come within its terms. (*Wirtz v. F. M. Sloan Co.*, 411 F. 2d 56 (C.A. 3), 18 WH Cases 878; *Gatlin Lumber Co. v. Mitchell*, 287 F. 2d 76 (C.A. 5) cert. denied, 366 U.S. 963.) By its terms, the exemption is limited to those employed in the named operations by an employer who employs not more than eight employees therein. The named operations are described in terms of ordinary speech and mean what they mean in ordinary intercourse in this context. These operations include the incidental activities normally performed by persons employed in them, but do not include mill operations.

### § 788.7 "Planting or tending trees."

Employees employed in "planting or tending trees" include those engaged in weeding, preparing firebreaks, removing "seeding, planting seedlings, pruning, rot or rusts, spraying, and similar operations when the object is to bring about, protect, or foster the growth of trees." "Tending trees" would also include watching the timberland to guard against thefts and fire (*Gatlin*

*Lumber Co. v. Mitchell*, 287 F. 2d 76, cert. den. 366 U.S. 963).

### § 788.8 "Cruising, surveying, or felling timber."

Employees engaged in "cruising \* \* \* timber" include all those members of a field crew whose purpose is to estimate and report on the volume of marketable timber. Employees engaged in "surveying \* \* \* timber" include the customary members of a crew accomplishing that function such as the chairmen, the transit men, the rodmen, and the axmen who clear the ground of brush or trees in order that the transit men may obtain a clear sight. Similarly, the usual members of a crew which go to the woods for the purpose of felling timber and preparing and transporting logs are engaged in operations described in the exemption. Typically included, when members of such a crew, are fellers, limbers, skidders, buckers, loaders, swamper, scalers, and log truck drivers.

### § 788.9 "Preparing \* \* \* logs."

Preparing logs includes, where appropriate, removing the limbs and top, cutting them into lengths, removing the bark, and splitting or facing them when done at the felling site, but does not include such operations when done at a mill. Employees engaged in sawmill, tie mill, and other operations in connection with the processing of logs, such as the production of lumber, are not exempt.

### § 788.10 "Preparing \* \* \* other forestry products."

As used in the exemption, "other forestry products" mean plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns and Christmas trees, roots, stems, leaves, Spanish moss, wild fruit, and brush. Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations which change the natural physical or chemical condition of the

products or which amount to extracting as distinguished from gathering, such as shelling nuts, or mashing berries to obtain juices.

[74 FR 26015, May 29, 2009]

**§ 788.11 “Transporting [such] products to the mill, processing plant, railroad, or other transportation terminal.”**

The transportation or movement of logs or other forestry products to a “mill processing plant, railroad, or other transportation terminal” is among the described operations. Loading and unloading, when performed by employees employed in the named operations, are included as exempt operations. Loading logs or other forestry products onto railroad cars or other transportation facilities for further shipment if performed as part of the exempt transportation will be considered a step in the exempt transportation (*Woods Lumber Co. v. Tobin*, 199 F. 2d 455 (C.A.5)). However, any other loading, transportation, or other activities performed in connection with the logs or other forestry products after they have been unloaded at one of the described destinations is not exempt. “Other transportation terminal” refers to any place where there are established facilities or equipment for the shipment or transportation of logs or other forestry products. Motor carrier yards, docks, wharves, or similar facilities are examples of other transportation terminals, but the place where logs are picked up by contract motor carriers or haulers at the site of the woods operations for transportation to the mill, processing plant, or railroad is not such a terminal.

**§ 788.12 Limitation of exemption to specific operations in which “number of employees \* \* \* does not exceed eight.”**

Regardless of his duties, no employee is exempt under section 13(a)(13) unless “the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.”

**§ 788.13 Counting the eight employees.**

The determination of the number of employees employed in the named op-

erations is to be made on an occupational and a workweek basis. Thus the exemption will be available in one workweek when eight or less employees are employed in the exempt operations and not in another workweek when more than that number are so employed. For a discussion of the term “workweek” see part 778 of this chapter. The exemption will not be defeated, however, if one or more of the eight employees so engaged is replaced during the workweek, for example, by reason of illness. But if additional employees are employed during the workweek in the named operations, even if they work on a different shift, the exemption would no longer be available if the total number exceed eight. Similarly, all of an employer’s employees employed in any workweek in the named operations must be counted in the eight regardless of where the work is performed or how it is divided. Thus if an employer employs four employees in felling timber and preparing logs at one location and five at another location in those operations, the exemption would not be available. Similarly, if he employs six employees in such operations and three other employees in transportation work as discussed in § 788.11, the exemption could not apply. Under such circumstances he would be employing more than eight employees in the named operations. The fact that some of these employees may not be engaged in commerce or the production of goods for commerce or may be engaged in other exempt operations will not affect these conclusions (*Woods Lumber Co. v. Tobin*, 199 F. 2d 455 (C.A. 5)). Except for replacements, therefore, all of an employer’s employees employed in the named operations in a workweek must be counted, regardless of where they perform their work or in which of the named operations or combinations of such operations they are employed. The length of time an employee is employed in the named operations during a workweek is also immaterial for the purpose of applying the numerical limitation. Thus, even if an employee would not himself be exempt because he is engaged substantially in nonexempt work (see § 788.17), nevertheless, if, as a regular part of his